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Court of Appeals
Division I
State of Washington
No. 74857-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ADVANCE ENVIRONMENTAL INC.,

Respondent,

v.

DIRECTOR, WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE LAURA GENE MIDDAUGH
KING COUNTY SUPERIOR COURT CASE NO. 15-2-15857-1KNT

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal concerns an asbestos regulation requiring employers to provide a 10-day notice to the Department of Labor and Industries (“Department”) prior to conducting an “asbestos project.” The regulatory definition of “asbestos project” excludes an intact removal of asbestos-containing materials, meaning that employers are not required to provide the notice if the removal keeps the asbestos-containing material intact. Neither party disputes this conclusion.

The heart of the parties’ dispute in this case concerns the allocation of the burden of proving the manner of removal, intact versus non-intact, and whether sufficient evidence was presented before the Board of Industrial Appeals (“Board”) to establish the method of removal, triggering the 10-day notice obligation.

The Administrative Law Judge and the Superior Court Judge each agreed with Advance Environmental Inc. (“Advance”), concluding that the Department failed to present sufficient evidence to establish that Advance’s work was not an intact removal. In contrast to the Board, they each recognized that the burden of proving the method of removal was properly allocated to the Department. Because the method of removal is incorporated into the definition of “asbestos project” it is included within the elements of the Department’s case and is not an affirmative defense.

The sole evidence presented at the hearing was the testimony of McClelland Davis, which was offered by the Department. While Mr. Davis initially testified that he did not believe that an intact removal was possible, he lacked experience, education, or training regarding floor removal methods and he conceded on cross examination and re-direct that an intact removal was possible. Mr. Davis did not offer any testimony reflecting experience, training, or education regarding floor removal methods; instead, he admitted that he had no experience in construction or performing asbestos abatement. And after initially testifying that an intact removal was not possible, he conceded that it was possible to perform an intact removal using either a pry bar or an ax.

Because the Board committed an error of law by improperly shifting the burden of proving the manner of removal to Advance and because Mr. Davis's testimony is unable to carry this burden, this Court should affirm the Superior Court's order and judgment vacating Citation Item 2-1.

II. STATEMENT OF THE ISSUES

A. Should this Court affirm the Superior Court's conclusion that the Board of Industrial Appeals committed an error of law by shifting the burden of proving the method of removal to Advance where the method of removal is an element of the Department's case and not an affirmative defense? Yes.

- B. Should this Court affirm the Superior Court’s conclusion that Citation Item 2-1 was not supported by substantial evidence where the Department’s sole witness was not qualified to testify regarding the manner of removal, offered unclear testimony regarding the manner of removal, and contradicted the Department’s position? Yes.**

III. COUNTER STATEMENT OF THE CASE

- A. The Department’s case rested upon the testimony of McClelland Davis, who lacked qualifications regarding floor removal methods and contradicted his opinion regarding the possible method of removal.**

The sole factual issue presented by Citation Item 2-1 was whether Advance could have performed an intact removal of the vinyl flooring from the mobile homes in Auburn. CP at 57. The Department contended that an intact removal was not possible. CP at 57. The Department’s contention was based solely upon the testimony of McClelland Davis. CP at 25-56, 183¹. However, Mr. Davis lacked experience or other qualifications regarding flooring removal methods and he conceded on cross examination that an intact removal was possible. *See* CP at 187-242.

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¹ The Department contends that Advance requested waiver of the notice requirement. *See* Brief of Appellant at 3 (citing CP at 193). However, this argument misrepresents the record. While Mr. Davis did testify regarding a request for waiver, there is no evidence that the request came from Advance. *See* CP at 193 (stating that “I then went to my fellow supervisor and found out that he had turned down the project a few days earlier.”). Mr. Davis testified about a request for a waiver made by a person unaffiliated with Advance; it came from Randy Gee, the general contractor. *See* CP at 28:11-15, 192.

(1) Mr. Davis lacked experience or other qualifications regarding the methods for floor removal.

While Mr. Davis testified that he has experience conducting and reviewing industrial hygiene compliance inspections, he did not offer any testimony regarding education, training, or experience related to floor removal methods. *See* CP at 187-242. Instead, he conceded that he did not have any experience in the construction field or performing abatement work. CP at 221:5-7. And, he did not offer any other testimony reflecting experience, training, or education regarding floor removal methods. *See* CP at 187-242.

(2) On cross examination, Mr. Davis conceded that intact floor removal was possible.

While it appeared that Mr. Davis initially testified that it was not possible for Advance to perform an intact removal of the vinyl flooring, he contradicted that contention on cross examination and ultimately conceded that he did not know. *Compare* CP at 195:18-22 *and* CP at 223:6-2, 235:23-236:16. He initially testified that “I’m not sure that they could have removed the floor other than peeling it or trying to cut it out.” CP at 195:21-22. Elaborating, he stated that:

Well, first of all, I wasn’t there to see it. That’s my problem. Second, it was – there was no floor up to the walls. And I just can’t imagine any way that you could not remove the sheet vinyl and the underlayment, which I suppose would be particleboard or plywood depending

upon the year of construction of a mobile home, without having to cut through it. And to cut through it means you're cutting through asbestos-containing material.

CP at 195:23-196-6.

However, Mr. Davis contradicted this position on cross examination. Specifically, he offered the following testimony:

Q. If you was [sic] to slice the sheet vinyl on the seam, get the Burke Bar underneath the plywood, pry it up, and then it would be in a 4 by 8 method, wouldn't that be correct?

A. I suppose if someone were to try that, yes.

Q. Would a 4 by 8 sheet fit through the door to go outside the mobile home?

A. I would think so.

Q. So if Advance Environmental claimed that they removed it **intact** and pulled the sheets up whole, wrapped them, and carried them out the door, without you being there, would that be hard for you to take and say yes or no?

A. I don't know how it was done, so I'm not sure.

Q. But you're not saying it could not be done; right?

A. I don't know. I didn't – **it could be done, I suppose, the way you're saying.**

CP at 223:6-26 (emphasis added). Mr. Davis reinforced this position on redirect. He was twice asked whether it was possible to perform an intact removal using a bar or Burke bar; each time he conceded that it was

possible. CP at 235:23-236:16. On the second occasion, he offered the following testimony:

Q. ... Do you believe that a Burke Bar removal could have been done here?

A. The way the – the way it looked at the edges, around there, I know something caused the floor to be removed, pry bars, et cetera. But it appeared that they would have to cut around the edges. And I just didn't see ragged edges; I saw clean edges. **So possibly. I don't know.**

CP at 236: 8-16 (emphasis added). Ultimately, he could not render an opinion regarding whether it was possible to remove the vinyl flooring intact. *See Id.*

B. The Industrial Appeals Judge ruled in favor of Advance, concluding that the Department failed to carry its burden of proof.

Based on the testimony of Mr. Davis, Industrial Appeals Judge Anamaria Gil concluded that the Department failed to prove Citation Item 2-1 by a preponderance of evidence. CP at 58:24-27. Judge Gil was persuaded by Mr. Davis's lack of experience with asbestos-containing material removal in mobile homes, his lack of a background in construction, and his concession that it was possible to remove the flooring intact using a Burke bar. CP at 58:8-14.

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C. The Board of Industrial Appeals reversed the Industrial Appeals Judge, noting that Advance did not present evidence of the manner of removal.

The Department filed a petition for review, challenging the Industrial Appeals Judge's Proposed Decision and Order. CP at 32-44. The Board of Industrial Appeals granted the petition and reversed the Industrial Appeals Judge. CP at 16-25. As reflected in its Decision and Order, the Board shifted the burden of proving the manner of removal to Advance. *See* CP at 18. Specifically, it noted that:

Advance maintains that the flooring was removed intact and therefore it had no obligation to notify the Department 10 days before the removal of ACM. However, Advance did not present evidence of the manner in which the flooring was removed.

CP at 18:33-37.

D. The Superior Court Judge reversed the Board, concluding that the Board's Decision and Order was based upon an error of law and was not supported by substantial evidence.

Advance appealed to Superior Court, contending that the Board's Decision and Order was based upon an error of law and was not supported by substantial evidence with respect to Citation Item 2-1. CP at 293-306, 307-315. Specifically, it argued that the Board committed an error of law by shifting the burden of proving the manner of removal and that the Board's findings related to the manner of removal were not supported by substantial evidence based upon Mr. Davis's lack of qualification and

contradictory testimony. CP at 293-306, 307-315. The Superior Court Judge ruled in favor of Advance, accepting its arguments that the Citation Item 2-1 was not supported by substantial evidence and was based upon an error of law. CP at 316-18.

IV. ARGUMENT

A. This Court should affirm the Superior Court’s conclusion that the Board committed an error of law by shifting the burden of proof regarding the manner of removal to Advance.

The Superior Court correctly concluded that the Board committed an error of law by improperly shifting the burden of proof regarding the manner of removal to Advance. *See* CP at 18:33-37, 316-18. This issue presents a question of law, which is reviewed by this Court de novo. *See Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 817, 306 P.3d 920 (2013) (stating that “[t]he appellate court reviews de novo an agency's conclusions of law and its application of the law to the facts.”).

Here, the Board’s Decision and Order suggests that it concluded that Advance was responsible for proving that the vinyl flooring was removed intact. *See* CP at 18:33-37. Specifically, it noted that:

Advance maintains that the flooring was removed intact and therefore it had no obligation to notify the Department 10 days before the removal of ACM. However, **Advance did not present evidence of the manner in which the flooring was removed.**

CP at 18:33-37 (emphasis added). In addition, the Board concluded that “[t]he theoretical cross-examination questions about the method Advance used to remove the ACM are speculative. Inferences from these questions are not sufficient **to show** that the ACM was removed intact.” CP at 19:4-8 (emphasis added). As reflected in this language, it appears that the Board shifted the burden of proving the existence of an intact removal to Advance. This is an error of law because the Department bears the burden of proving the method of removal. The burden is properly placed on the Department because (1) the issue of intact removal is incorporated into the definition of an “asbestos project” and is not an affirmative defense, (2) there is no presumption of non-intact removal, and (3) the Department’s policy arguments are unpersuasive.

- (1) The burden of proving the manner of removal rests upon the Department because it was incorporated into the definition of an “Asbestos Project” and was not a statutory exception or affirmative defense.

The Department bears the burden of proving that a removal was non-intact because the manner of removal is incorporated into the definition of “asbestos project,” and is contained within the Department’s obligation to prove that the cited standard applies. It is not a statutory exception or an affirmative defense. Therefore, the Department bears the

burden of proving that the removal of asbestos-containing material was non-intact.

Washington courts have shifted the burden of proof to employers only for affirmative defenses. *See e.g. J.E. Dunn Nw., Inc. v. Washington State Dep't of Labor & Indus.*, 139 Wn. App. 35, 46-47, 156 P.3d 250 (2007). Whether an issue presents an affirmative defense or an element of the Department's case turns upon the statutory and regulatory language. *See Asplundh Tree Expert Co. v. Washington State Dep't of Labor & Indus.*, 145 Wn. App. 52, 61, 185 P.3d 646 (2008). Specifically, Washington courts have concluded that “[a] statutory exception is an affirmative defense unless the statute reflects legislative intent to treat proof of the absence of the exception as one of the elements of a cause of action, or the exception operates to negate an element of the action.” *Asplundh*, 145 Wn. App. at 61. Here, intact removal is excluded from the definition of intact removal and, therefore, operates to negate an element of the action.

The regulatory language regarding intact removal is contained within the definition of an “asbestos project.” *See* WAC 296-62-07722. The 10-day notification requirement at issue is only required for “asbestos projects.” *See* WAC 296-65-020(1) (stating that “[b]efore any person or individual begins an asbestos project as defined in WAC 296-62-07722

and 296-65-003 ... written notification must be provided to the department.”). Under WAC 296-62-07722(3)(b)(ii)(B), asbestos work is not considered an asbestos project if it involves intact asbestos containing materials. In contrast, asbestos work does constitute an asbestos project if the asbestos containing materials do not stay intact. *See* WAC 296-62-07722(3)(b)(i)(B).

The Department bears the burden of proving that the cited standard applies. “When alleging a ‘serious’ violation of a WISHA regulation, the Department bears the burden of proving both the existence of the elements of the violation itself and the existence of those additional elements of a “serious” violation enumerated in RCW 49.17.180(6).” *J.E. Dunn*, 139 Wn. App. at 44. The Department must prove the existence of five elements: (1) the cited standard applies, (2) the requirements of the standard were not met, (3) employees were exposed to the violative condition, (4) the employer knew of the violative condition, and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *See J.E. Dunn*, 139 Wn. App. at 44.²

The first element, that the cited standard applies, incorporated the issue of whether the removal was intact. If the removal was intact, they the

² This is an abbreviated recitation of the standard. Some of the elements, not at issue here, are more detailed than recited here. For example, the fourth element is that the “the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. . . .” *See J.E. Dunn*, 139 Wn. App. at 44.

notice standard does not apply. In order to prove that the notice standard applied, the Department had to prove that the removal was not intact.

Because the issue of an intact versus non-intact removal operates to negate any element of the Department's case, it is not an affirmative defense and it was improper to shift the burden to Advance.

In addition, the regulatory language regarding intact removal is materially distinct from WISHA defenses that Washington courts have identified as affirmative defenses. For example, Washington courts have concluded that employee misconduct is an affirmative defense based upon the statutory language regarding the defense. *See Asplundh*, 145 Wn. App. at 61; *See Also J.E. Dunn*, 139 Wn. App. at 46-47. The statutory language regarding employee misconduct specifically allocates the burden of proof to the employer, stating that “[n]o citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but **the employer must show** the existence of” four elements. RCW 49.17.120(5)(a) (emphasis added). Washington courts have found that this language establishes legislative intent to place the burden for placing the burden of proving employee misconduct on the employer. *See Asplundh*, 145 Wn. App. at 61; *See Also J.E. Dunn*, 139 Wn. App. at 46-47.

Unlike the affirmative defense of employee misconduct, there is no statutory language expressly allocating the burden of proof regarding the manner of removal to the employer. *See* WAC 296-62-07722(3)(b)(ii)(B). And because the issue of an intact removal operates to negate an element of the Department's case, that the cited standard applies, it was improper for the Board to shift the burden of proving the manner of removal to Advance. Accordingly, this Court should affirm the Superior Court's conclusion that the Board committed an error of law by shifting the burden on the issue of intact versus non-intact removal to Advance.

- (2) The Department's contention that a presumption of non-intact removal should attach for all vinyl flooring removal is raised for the first time in violation of RAP 2.5(a) and is unpersuasive.

The Department argues that the language of WAC 296-62-07722(3)(b)(i)(B) supports a presumption that all vinyl flooring removal is non-intact. *See* Brief of Appellant at 19-20. However, this argument is presented for the first time on appeal and is unpersuasive.

The Department's presumption argument is raised for the first time on appeal in violation of RAP 2.5(a). Here, the Department acknowledges that it did not raise this argument previously, stating that "[t]he Department does not seek affirmative relief based upon this argument not raised below" Brief of Appellant at 19, n.1. Given that this argument

was not timely raised and that the Department does not seek any relief based upon it, it should be disregarded by this Court.

Even if this Court was to consider it, the Department's presumption argument is unpersuasive. The Department's argument is based upon an attempt to improperly truncate a portion of regulatory language and remove it from its context entirely. Notably, the Department recites only a portion of the regulatory subsection at issue, stating that "[t]his is most clear from the language of the regulation defining 'asbestos project' as one 'where asbestos containing materials do not stay intact (including removal of vinyl asbestos floor . . .).'" *See* Brief of Respondent at 19 (citing a portion WAC 296-62-07722(3)(i)(B)). The ellipsis is offered to cover a flaw in the argument.

The entire subsection states that an "asbestos project" includes "[a]ll Class II asbestos work where asbestos containing materials do not stay intact (including removal of vinyl asbestos floor (VAT) or roofing materials **by mechanical methods such as chipping, grinding, or sanding**)." WAC 296-62-07722(3)(i)(B) (emphasis added). The only way to find support for a presumption would be to divorce the phrase "including removal of vinyl asbestos floor . . .", as the Department has attempted, from the other language in the subsection, disregarding the language outside the parenthetical regarding non-intact removal and

ignoring the language “by mechanical methods such as chipping, grinding, or sanding.” *See* WAC 296-62-07722(3)(i)(B). Read within its context, the reference to vinyl flooring relates to non-intact removal through chipping, grinding, or sanding, rather than a general statement regarding vinyl flooring.

(3) The Department’s policy arguments reflect dissatisfaction with its own regulation and are unpersuasive.

Throughout this case, the Department has emphasized and re-emphasized the severe risks asbestos exposure presents to employees, particularly in instances when the Department is unable to conduct an investigation based upon a lack of notice. *See e.g.* Brief of Appellant at 17-18. However, these concerns simply reflect the Department’s criticism of its own regulatory framework. The Department could have required the 10-day notice in advance of any removal of asbestos containing material, regardless of whether the removal was intact. Presumably, the Department concluded that notice for intact removal was not warranted because an intact removal does not present the health and safety risks associated with a non-intact removal.

In addition, it is anticipated that the Department may attempt to claim that placing the burden of proving the occurrence of a non-intact removal places it in an impossible position. However, any such contention

represents another criticism of the Department's own regulatory framework. The Department elected to include an intact removal as a part of the definition of an "asbestos project" rather than making it a separate defense for which an employer would bear the burden of proof. The difficulty that the Department had in proving a non-intact removal is unique to this case. In other cases, the Department could establish the manner of removal circumstantially through the testimony of a qualified witness who does not contradict the Department's position.

B. The Superior Court correctly concluded that the Board's findings regarding the method of removal and risk were not supported by substantial evidence because Mr. Davis was not an expert regarding floor removal and he contradicted his opinion that an intact removal was not possible.

This Court should affirm the Superior Court's conclusion that Citation Item 2-1 was not supported by substantial evidence, with respect to the Board's findings that Advance's work constituted an "asbestos project" and that Advance employees were subjected to a substantial probability that death or serious physical harm.³ See CP at 20. "Findings of fact are reviewed under the substantial evidence test and will be upheld

³ Findings of Fact 3 and 4 in the Board's Decision and Order. CP at 20. In relevant part, the Board found that Advances work was "an asbestos project because mechanical methods for removal of the asbestos containing material were used." *Id.* (Finding of Fact 3). And, the Board found that "[a] substantial probability existed that Advance employees exposed to the hazard described in Items No. 1-1 and 2-1 would be injured, and that if harm resulted, it would be serious physical harm, including the possibility of cancer, long-term disease, and suffering." *Id.* (Finding of Fact 4).

if supported by a sufficient quantity of evidence to persuade a fair-minded person of the order's truth or correctness.”⁴ *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d at 817 (internal quotation marks omitted).

Because the Department did not meet its burden of proving a non-intact removal of the vinyl flooring, Advance’s work did not constitute an “asbestos project” and the 10-day notice requirement did not apply. In addition, the Department failed to establish that Advance’s employees were subject to any health and safety risk associated with work that did not constitute an asbestos project. The Board’s findings regarding the method of removal and the risk to employees are not supported by substantial evidence because (1) the Department’s sole witness was not qualified to testify regarding the manner of removal and (2) his testimony, viewed as whole, was insufficient to carry the Department’s burden of proving a non-intact removal.

(1) The Board’s findings are not supported by substantial evidence because Mr. Davis was not qualified regarding the manner of floor removal.

The Board’s findings, that Advance’s work constituted an “asbestos project” and presented a substantial probability that death or

⁴ The Department’s request for additional deference based upon the contention that the factual issues in this case are “complex, technical, and close to the heart of the agency’s expertise” is unpersuasive given that the Department’s expert witness was unqualified regarding the key factual issue and he contradicted the Department’s position, as discussed *infra*. See Brief of Appellant at 9.

serious physical harm to its employees, were not supported by substantial evidence because Mr. Davis was not qualified to testify regarding the possible mechanisms for floor removal or the actual method of removal based upon circumstantial evidence. *See* CP at 188-89, 221:5-7. Advance is not attempting to make a retroactive challenge to the admission of his testimony on this subject; instead, its argument concerns the weight that should be given to Mr. Davis's testimony for the purpose of determining whether the Board's findings were supported by substantial evidence. *See* CP at 278.

Mr. Davis's qualifications should be considered when determining whether there exists "a sufficient quantity of evidence to persuade a fair-minded person of the order's truth or correctness." *Raven*, 177 Wn.2d at 817. "[T]he expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise." *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 924, 15 P.3d 188 (2000). This standard should affect not only the admissibility but also the weight given to expert testimony.

Here, Mr. Davis lacked sufficient qualifications to lend any weight to the testimony he gave regarding the possible or actual method of floor removal. While he testified that he was experienced as an industrial hygiene inspector, he testified that hygiene inspectors "deal with

chemicals, radiation, and biologicals.” CP at 188-89. He noted that hygiene inspectors are distinct from safety workers, who focus on physical safety in construction and manufacturing work. CP at 188-89. He did not offer any testimony establishing a connection between his work as an industrial hygienist and floor removal methods. He did testify that he has no experience performing abatement work or in construction. CP at 221:5-7.

In short, he failed to offer any experience, education, or training related to floor removal methods. Highlighting his lack of qualification, his ultimate opinion was that he did not know whether it would have been possible to remove the flooring using a Burke bar or an ax. CP at 236:8-16, 237:18-26. Accordingly, the Department and Board’s reliance upon Mr. Davis’s testimony is misplaced; he was not qualified to testify regarding the possible or actual method of removal. Therefore, the Board’s finding that Advance’s work constituted an “asbestos project” was not supported by substantial evidence.

(2) Mr. Davis’s testimony was insufficient to carry the Department’s burden of proving a non-intact removal because he lacked knowledge regarding floor removal methods, he contradicted his initial opinion that an intact removal was not possible, and his testimony was unclear.

In addition, the Board’s findings are not supported by substantial evidence because Mr. Davis’s testimony, viewed as a whole, was

insufficient to bear the Department's burden of proving a non-intact removal. While Mr. Davis initially testified that he did not believe it was possible for Advance to have removed the vinyl flooring intact, a thorough review of his testimony reveals that (i) his initial opinion was based upon a lack of knowledge regarding alternative removal methods and tools, (ii) he contradicted his initial opinion by admitting that an intact removal was possible using a pry bar or ax, and (iii) his testimony was unclear. *See* CP at 195-99, 235, 236, 237.

- i. *Mr. Davis's initial opinion that an intact removal was not possible was based on his lack of knowledge regarding alternative methods of removal.*

Mr. Davis concluded on direct examination that it was not possible for Advance to perform an intact removal because he was not aware of an alternative. In summary, Mr. Davis's opinion was that Advance could not have removed the vinyl flooring without using a saw to cut through it because he was not aware of another method of removal. *See* CP at 195-199. Using a saw to cut through the vinyl flooring sheets would be removal by a mechanical method, rather than an intact removal. *See* WAC 296-62-07722(3)(i)(B); *See* CP at 195-99.

As an initial matter, it is important to note that the Department makes multiple assertions regarding Mr. Davis's opinion that are not supported by the record. First, it contends that "[e]ven cutting along the

seams would not be intact removal because peeling, sawing into the floor, or removing the floor with a pry bar would release asbestos.” Brief of Appellant at 15 (citing CP at 197-99). However, neither the portions of the record cited by the Department, nor the record in its entirety support this contention. *See CP generally*. Mr. Davis’s testimony regarding the release of asbestos was limited to cutting “**through** the vinyl sheet containing asbestos.” CP at 199:9-14. (emphasis added). Second, the Department argues that Mr. Davis rejected the possibility that the floor could have been removed with an ax or pry bar. Brief of Appellant at 15 (citing CP at 222, 236). However, this contention is also contrary to the record, as discussed in more detail *infra*. *See CP* at 235:23-236:16, 237:18-26

Mr. Davis repeatedly explained that he believed that Advanced used mechanical methods such as a saw because he was unaware of an alternative. *See CP* at 195-98. Specifically, he testified that he was “not sure [he knew] how they could have done it without cutting it out.” CP at 197:17-18. He also testified that he did not “know of any kind of knife or anything that would cut it out in a manner that would allow it to be cut through the wood and the sheet vinyl.” CP at 198:12-14. Viewed as a whole, Mr. Davis’s conclusion that it was not possible for Advance to

remove the flooring intact was based on his lack of knowledge regarding an alternative means of removal to a saw.⁵

- ii. *On cross examination and re-direct, Mr. Davis contradicted his opinion that an intact removal was not possible.*

When asked about removal of the vinyl flooring intact by means of a pry bar or ax, Mr. Davis contradicted his initial opinion that an intact removal was not possible. On cross examination, he was asked about whether it was possible to remove the vinyl sheeting intact, by cutting along the seam, rather than through it, and pry up the plywood underneath. *See CP at 223:6-26. He admitted that it was possible. See Id.*

Then on redirect, he once again contradicted his initial opinion that it was not possible to remove the vinyl flooring intact. CP at 235:23-236:16. For example, he testified as follows:

Q. ... Do you believe that a Burke Bar removal could have been done here?

A. The way the – the way it looked at the edges, around there, I know something caused the floor to be removed, pry bars, et cetera. But it appeared that they would have to cut around the edges. And I just didn't see ragged edges; I saw clean edges. So possibly. **I don't know.**

⁵ And while a qualified expert's opinion that he or she is not aware of an alternative possibility can be persuasive testimony under certain circumstances, Mr. Davis was not qualified regarding methods of floor removal, as addressed *supra*.

CP at 236: 8-16 (emphasis added). The Department's position was founded solely upon the testimony of Mr. Davis; primarily, his initial opinion that an intact removal was not possible. *See* Brief of Appellant at 6. When Mr. Davis contradicted that opinion he nullified the evidence upon which the Department relied upon in attempting to bear its burden of proving that the removal was non-intact. Given this contradiction, the Board's findings regarding Advance's work constituting an "asbestos project" and the risk of such work to Advance's employees were undermined. In light of Mr. Davis's contradiction of the Department's position, these findings are not supported by substantial evidence.

The Department attempts to avoid this conclusion by asking this Court to disregard the portions of Mr. Davis's testimony that do not support its position. Specifically, it argues that his answers to hypothetical questions should not be given any weight. *See* Brief of Appellant at 14. This argument presents a unique scenario where a party is challenging the testimony of its own expert witness and is unpersuasive. *Contra Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) and *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 508 P.2d 1370 (1973) (where parties challenged the admission of their opposing parties' expert testimony).

Mr. Davis's testimony on cross examination and re-direct shared a common factual basis as his initial opinion on direct that intact removal

was not possible. The factual basis for his opinions, both his initial opinion that an intact removal was not possible and his subsequent concession that it was, was his investigation of the site after the removal occurred. *See* CP at 194-95. In addition, he testified that he was notified by Advance that it performed an intact removal. CP at 201. His concession that an intact removal was possible is not anymore based upon speculation or conjecture than his initial opinion.

Accordingly, the Department's request for this Court to disregard key portions of Mr. Davis's testimony should be denied. The practical effect of the Department's argument would be to shift the burden of proof regarding the manner of removal to Advance, contrary to law.

iii. *In addition to being contradictory, Mr. Davis's testimony regarding the possible method of removal was unclear.*

The Board's findings related to the method of removal were also undermined by the unclear nature of Mr. Davis's testimony. The Department emphasizes Mr. Davis's testimony regarding the condition of edges, suggesting that an intact removal was not performed. *See* Brief of Appellant at 15 (citing CP at 222, 236). However, his testimony regarding the edges was unclear. *See* CP at 236. He failed to identify the edges he was describing. *See Id.* When testifying about the edges, he said he saw clean edges and then stated that it was possible for Advance to have

performed an intact removal using a Burke Bar. CP at 236:8-16. And when asked if it was possible to get clean edges with a Burke Bar, he said “[n]ot that I know of.” CP at 236:17-18. Considering his lack of expertise and contradictory testimony, this statement reflects a lack of knowledge rather than a basis to infer the manner of removal.

V. CONCLUSION

Advance respectfully requests that this Court affirm the Superior Court’s determination that Citation Item 2-1 is based on an error of law and is not supported by substantial evidence, with respect to Findings of Fact 3 and 4. Because the Department failed to carry its burden of proving that Advance’s work constituted a non-intact removal, its work did not meet the definition of an “asbestos project” and the 10-day notice requirement did not apply.

RESPECTFULLY SUBMITTED this 20th day of July, 2016.

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/s/ Trevor D. Osborne

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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ADVANCE ENVIRONMENTAL, INC.,
Plaintiff/Respondent

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
Defendant/Appellant.

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COUNTY OF PIERCE)

Jody M. Waterman, being first duly sworn upon oath, deposes and says:

I am over the age of 18 years and competent to be a witness herein; that on the 20th day of July, 2016, I filed and served RESPONDENT'S OPENING BRIEF via Email and/or First Class Mail on the persons whose names and addresses are shown below:

NAME AND ADDRESS:

METHOD OF SERVICE:

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Court of Appeals, Division I
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Seattle, WA 98101

JIS Link

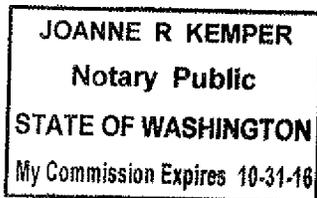
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JODY M. WATERMAN

SIGNED AND SWORN to before me this 20th day of July, 2016, by Jody M. Waterman.





Print Name: JOANNE R. KEMPER
NOTARY PUBLIC in and for the State of
Washington.
My commission expires: 10/31/2016